FILED
OCT 20 1994
OFFICE OF THE CLERK

No. 94-492

In The

Supreme Court of the United States

October Term, 1994

UNION SCHOOL DISTRICT, CALIFORNIA DEPARTMENT OF EDUCATION, CALIFORNIA SUPERINTENDENT OF PUBLIC INSTRUCTION,

Petitioners,

v.

BERNARD SMITH, by and through his parents, JOHN and DONNA SMITH (UNDER SEAL),

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

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I

INTRODUCTION

Respondents' claim that petitioners seek a factual review is disingenuous. Even if every additional fact included in respondents' opposition had been confirmed by the District Court or Ninth Circuit, the issue remains: Does the Individuals With Disabilities Education Act (IDEA), at 20 U.S.C. § 1400 *et seq.*, authorize the extraordinary remedy provided, *to wit,* establishing a second dwelling for the family of a disabled pupil at public expense?

This legal question is of serious consequence to all of the states, not just California. If respondent Bernard Smith, his mother and sister were entitled to move to Los Angeles at public expense, then would a family in a similar situation be entitled to move to the midwest or even Japan at public expense? What if not only the mother, but the father and siblings were determined to be necessary to the implementation of the pupil's IEP. Would they, too, be able to move about the country with the pupil at public expense?

These are not frivolous questions. In fact, these very questions were asked of the respondents by the panel of the Ninth Circuit and respondent's counsel answered in the affirmative without hesitation, even offering the example of the school as far away as Japan!

Petitioners believe that the decisions below seriously distort the IDEA and previous Supreme Court decisions, reaching far beyond what was intended in the entitlement to a "free, appropriate public education".

II

ARGUMENT

THIS CASE INVOLVES IMPORTANT QUESTIONS OF LAW THAT SHOULD BE SETTLED BY THIS COURT

A. The Petition Does Not Request Review of Factual Issues.

Ignoring that these petitioners have adopted the statement of facts of the District Court, respondents attempt to characterize this case as one of facts rather than law. However, no one disputes that the pupil, Bernard Smith, benefited from the unilateral placement in the program in Los Angeles. For purpose of decision on the law, the petitioners would concede that the programs offered by the school district did not include a 40-hour-per-week educational program, a full time behavioral aide, or parent training in the home, as subsequently found appropriate and ordered by the hearing officer.

However, the important issues are: Did the hearing officer, the district court and the Ninth Circuit have the *authority under the IDEA to order the district to pay for a family apartment* when the parents unilaterally chose a private day program for Bernard beyond a reasonable commute distance from their residence in San Jose without following the IDEA procedures? Even assuming that all the facts as stated by respondents in their opposition are true, these questions remain, and they are clearly legal questions.

B. These Important Legal Questions Need Resolution By This Court.

The lower courts' decisions distort the requirements of the IDEA and make mockery of the carefully crafted procedures that Congress established in the IDEA for resolving substantive and compliance disputes.

Petitioners have demonstrated persuasively in their petition that parent apartments are *not* authorized by the related services provision of the IDEA, 20 U.S.C. § 1401(a)(17), as found by the lower courts. The only reference to residence,

lodging, dwellings, room and board (or whatever term one prefers) is the inclusion of *residential schools* as part of the entitlement to a free, appropriate public education.

Yet the courts below, without reference to the above arguments, summarily concluded that parent apartments are related services. There is no authority for such a holding.

Likewise, the lower courts *completely ignored* the state petitioner's argument that parents, while entitled to seek private placements, must at least pursue their procedural remedies against a school district.

The respondents argue that the hearing officer found that the district did not offer an appropriate IEP in June or September of 1989. Even assuming the truth of the hearing officer's findings (which were made a year later, in June of 1990) does not cover up the fact that the Smiths did not contest the district's offer in June of 1989, and without notice to the district the Smiths unilaterally located the private placement in Los Angeles, enrolled Bernard there, rented an apartment, and then demanded payment. Seven months later they requested a hearing under 20 U.S.C. § 1415.

The respondents complain that the school district refused to recognize Bernard's residency after he was relocated to Los Angeles.[1] Is this not the situation that the Court envisioned in *Honig v. Doe*, 408 U.S. 305 (1988) when it declared that the State educational agency, under 20 U.S.C. § 1414(d), must provide direct services to pupils when a district is unable or unwilling? Yet how is the State educational agency to know of the failure of a district to comply with the law if parents, like the Smith's, have no obligation to utilize state complaint procedures that are developed to resolve such compliance issues?

These are not factual disputes. They are legal questions of importance to every district in this nation that is grappling

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[1] Here it is important to recognize that while the district did argue that the pupil was not a resident for purposes of their refusal to pay for the Los Angeles private program and apartment, the district continued to conduct IEP meetings to offer a program locally.

with unilateral private placements by parents of disabled pupils. They are legal questions that this Court has not addressed.

C. No Prior Decision By This Court Is Dispositive.

Respondents rely heavily on three prior decisions of this Court. Yet none address the issues here.

In *Board of Educ., Etc. v. Rowley,* 458 U.S. 176 (1982) this Court clarified that the IDEA is designed to confer some educational benefit upon disabled pupils. This case, however, does not involve what is appropriate for a pupil. Rather, it asks, did Congress anticipate public payment for parent apartments under any circumstance?

In *Burlington School Committee v. Department of Educ.,* 471 U.S. 359 (1985) this Court concluded that parents cannot be denied reimbursement as equitable relief for unilateral private placements when parents "violate" the stay-put provisions of the IDEA (20 U.S.C. § 1415(e)(3)) when a district has failed to provide an appropriate program for the pupil. And in *Florence Co. Sch. Dist. Four v. Carter,* 141 S.Ct. 361 (1993) this Court found that parents could also be reimbursed for unilateral private placements under the conditions established in *Burlington,* even if the private school did not meet state certification standards, if, in fact, the pupil received appropriate education there.

Neither of these cases address the legal issues raised herein regarding reimbursement for family dwellings. *Burlington* and *Carter* were firmly grounded in the plain language of the IDEA that authorizes and requires private school placements, including residential schools, when no appropriate public educational program is available.

Neither of these cases controls parents who simply disregard the established IDEA procedures. It is one thing for this Court to hold, as it did in *Burlington,* that parents can "violate" the stay-put requirement, a requirement that only comes into play *after a parent has exercised their right to a hearing under 20 U.S.C. § 1415.* It is quite a different situation for the district court and Ninth Circuit to state, as they did here, that

a parent can be reimbursed for a unilateral placement when they eschew the very procedures that Congress established for them under the IDEA.

CONCLUSION

This Court has never addressed the important legal issues raised in this petition. Neither the district court nor the Ninth Circuit determined, as this Court did in *Burlington* and *Carter*, that the respondents were entitled to reimbursement as equitable relief. Instead, both lower courts found that *reimbursement for parent apartments was an entitlement* – a related service under the IDEA. This is an extraordinary holding that has far reaching consequences.

Neither lower court *even acknowledged* the state petitioners' arguments that parents are not free to claim a right to reimbursement for unilateral placements unless they themselves have made such a placement within the context of the detailed procedures carefully drafted by Congress in the IDEA.

Petitioners pray that this Court recognize the significance of these legal issues and accept the petition for review.

Respectfully submitted,

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